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No. 970

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

ABRAHAM FISHGOLD,

Petitioner,

vs.

SULLIVAN DRYDOCK & REPAIR CORPORATION AND ROY GRANATA, AS ACTING PRESIDENT AND ACTING TREASURER OF LOCAL 13, INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, C.I.O.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR ROY GRANATA, ETC., RESPONDENT

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Attorney for Granata, etc., Respondent.

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Opinions Below

The opinion of the District Court of the United States for the Eastern District of New York (R. 147-151) is reported in 62 F. Supp. 25. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 181-195) has not yet been reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on March 4, 1946 (R. 199). The petition for a writ of certiorari was filed on March 19, 1946, and granted on April 1, 1946. Jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)).

Statement

Applicable Statute

Those provisions of the Selective Training and Service Act of 1940, as amended (U. S. C., Title 50, Sec. 308), which are applicable in this case, appear at the end of this brief as Appendix A.

The Question Presented

Whether Section 8 of the Selective Training and Service Act of 1940 gives to an employee who has completed his period of training and service under such Act and been restored by his employer to the position held by him prior to his induction such a guaranty of actual work in such position for a period of one year after restoration thereto as would make it a violation of the Act for the employer temporarily to lay off such veteran for the same reasons and pursuant to the same rules as had applied to such veteran's employment prior to his induction.

Facts of the Case

This case began as a suit brought in the District Court of the United States for the Eastern District of New York under Subsection (e) of Section 8 of the Selective Training and Service Act of 1940, as amended (hereinafter referred to as the "Act"). The plaintiff, petitioner in this Court,

was an employee of the respondent, Sullivan Drydock & Repair Corporation (hereinafter referred to as the "employer" or "Corporation"), who had been inducted into military service and subsequent to his discharge therefrom had been re-employed by the Corporation. He sought a judgment against the Corporation for wages lost by him on eight (8) days during which petitioner had been "shaped up" or laid off, some months prior to the expiration of one year from the date of his reinstatement. Petitioner also sought a declaratory judgment (1) requiring the employer to refrain from "shaping up" or laying off the petitioner until after the expiration of one year from the date of his reinstatement, and (2) declaring that the insistence, by the labor union representing the Corporation's employees, upon the Corporation's compliance with the seniority provisions of the collective bargaining agreement between such union and the Corporation was not a good cause for "shaping up" or laying off the petitioner during such year.

Local No. 13, Industrial Union of Marine and Shipbuilding Workers of America, C.I.O. (hereinafter referred to as the "Respondent Union"), upon petition was by the District Court given leave to, and did, intervene, file an answer, and participate in the trial of the case.

The evidence and testimony adduced at the trial showed that on February 20, 1942, the Respondent Union was, pursuant to the National Labor Relations Act (U. S. C. Title 29, Secs. 151-166, and particularly Sec. 159) certified by the National Labor Relations Board as the exclusive representative of all the Corporation's employees, including welders (R. 64). Pursuant to the requirements of the National Labor Relations Act (see *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514) the Corporation on April 6, 1942, entered into a written contract with the Union, stipulating the terms and conditions of employment which were to prevail in the employer's ship-repair yard for all employees, including

welders (R. 65). This contract continued in effect until May 17, 1944, when a new collective bargaining contract was entered into by the Corporation and the Union.

One of the provisions of said collective bargaining contract of April 6, 1942, was as follows (R. 72):

> "In all cases of promotion, increase or *decrease in the working force*, the total accumulated length of service and ability to do the job shall be the basis for any such promotions or increases or *decreases in the working force*." (Emphasis supplied.)

On February 25, 1944, the Shipbuilding Commission of the National War Labor Board, pursuant to the War Labor Disputes Act of June 25, 1943, issued a Directive Order, which by its terms required the Corporation and the Union to incorporate the provisions thereof in a written contract. Among such provisions was the following (R. 67; Defendant's Exhibit "A"):

> "Promotions and reclassifications and increases or *decreases in the working force* shall be based upon length of service and ability to do the job. Whenever, between two or more men ability is fairly equal, length of service shall be the controlling factor." (Emphasis supplied.)

Pursuant to the Directive Order of the National War Labor Board the employer and the Union on May 17, 1944, executed a collective bargaining contract which incorporated the above quoted provision (R. 72), and which contract was in effect on August 25, 1944, the date of petitioner's restoration to his position, and is still in effect (R. 67).

The petitioner, Abraham Fishgold, was hired by the employer as a welder on December 21, 1942 (R. 100), when the collective bargaining contract of April 6, 1942, was still in effect. The petitioner became, and at all times mentioned in the complaint was, and now is a member of the respondent

Union (R. 47). On May 22, 1943, after having been in the service of the employer for five months, the petitioner was inducted into the armed forces (R. 57). Within forty days after his discharge from the armed forces, petitioner applied for and was restored by the Corporation to his former position as a welder (R. 57).

Approximately seven months after he was restored to his position, the petitioner, although reporting for work, was not assigned to work on nine days during a period beginning April 9, 1945, and terminating May 24, 1945 (R. 59). This failure on the part of the Corporation to supply the petitioner with work was due to the operation of the so-called "shape-up" system (R. 83), which had been in effect at the employer's ship-repair yard prior to and at the time of the petitioner's induction into the armed forces and had then operated in the same fashion as during the period April to May, 1945 (R. 92). Briefly described the "shape-up" is the system whereby in ship-repair yards, and other industrial establishments in which the available amount of work fluctuates from day to day, employees are notified that their services, because of a reduction in the available work, will not be required on the following day (R. 83). The employees "shaped-up" nevertheless usually report for work on the following day. From among those so reporting, their foreman or other supervisor selects such number as may be required for the work then available. This selection is made on the basis of the individual employee's ability to do his work and on his seniority, or relative length of service with the employer; the employee with the greater seniority being the first assigned to work, the employee with the next greater length of service being next assigned, and so on until all "shaped-up" employees for whom work is available have been assigned to work (R. 85-86). The "shape-up" has been in existence in all the ship-repair yards in the Port of New York for at least twenty-six

years and is an unavoidable practical method of adjusting the working force to the amount of work available (R. 90-91).

The "shape-up" notice differs radically from the notice given to an employee who is discharged (Defendant's Exhibits "C" and "D"); the "shaped up" employee retains the identification badge issued to him by the employer, is not required to remove his tools from the employer's yard or shop, and is not required to fill out a new application for employment upon return to the yard after receiving a "shape-up" notice (R. 87).

The "shape-up" of the petitioner was occasioned as follows:

During March, 1945, the amount of work available for welders in the employer's shipyard was insufficient to afford work for all the welders in its employ. Since he had lower seniority than other employees, the petitioner was "shaped up" on one or more days during March, 1945 (see Arbitrator's Award, annexed to Defendant's Answer, R. 13-21, and admitted in evidence R. 77-78). Petitioner protested to Selective Service Headquarters which, in turn, instructed the employer to keep petitioner at work. Such instructions were contained in a letter from the New York State Director of Selective Service Headquarters dated March 31, 1945, and reading in part as follows (R. 16, 74):

> "In the case of the above named veteran, it appears that he was laid-off under a so-called 'shape-up' because, from time to time, there was not enough work to go around for all the employees and that non-veterans with greater union seniority than he had and were doing exactly the same kind of work that he was, were kept at work on the 'shape-up'."
>
> "It is the position of Selective Service System that a veteran who has been reinstated in employment may not be laid off or denied the right to work if there is

work to be done which he is capable of doing. In other words, under a 'shape-up' or any other similar practice, if there is *some* work available for *some* men, the veteran must be kept at work even though this may necessitate laying off non-veterans with greater union seniority."

As a result of the above quoted letter the Corporation on March 13, 1945, "shaped up" one of its welder employees, G. Jackerson, who had greater seniority than petitioner (R. 89). The Union, by letter dated March 16, 1945, protested to the employer against this departure from the above quoted provision of the collective bargaining contract (Plaintiff's Exhibit 2). On April 2, 1945, the Union filed a written "grievance" with the employer, in accordance with the procedure stipulated in the collective bargaining contract between them, in which "grievance" the Union renewed its complaint against the "shape-up" of the employee Jackerson in favor of the petitioner (R. 71). Since the Corporation felt constrained to abide by the instructions received from Selective Service Headquarters, it decided the protest against the Union so that arbitration of the dispute became necessary, and the Corporation and the Union, in accordance with their collective bargaining agreement (R. 67-68) entered into a submission stipulating the issue to be arbitrated (Defendant's Exhibit "B"). The National War Labor Board appointed Frank Harris, Esq., as Arbitrator, and he, after hearing the case decided that the petitioner should have been "shaped up" and Jackerson should not have been "shaped up" (R. 73, 77, and Arbitrator's Award, R. 13-21).

Since the collective bargaining contract between the Union and the Corporation provided that the decision of the Arbitrator "shall be final and binding upon all the parties hereto," the employer thereafter, on the days hereinabove enumerated, "shaped up" Fishgold, rather than

Jackerson, when there was not enough work for both of them.

At the conclusion of the trial the Union made a motion to dismiss the complaint on the ground that neither the allegations nor the proofs demonstrated the existence of a cause of action. The motion was denied. The District Court held, instead, that during the year following his re-employment by the Corporation the petitioner was entitled to be assigned to work, on any day that work was available, in preference to all employees who were not veterans of World War II (R. 150). The District Court entered judgment for the petitioner for $86.40, representing wages lost by him on the nine days during which he had been "shaped up." The declaratory judgment requested by the petitioner was, however, denied, because the year during which the Court held the petitioner was entitled to preference had expired prior to the close of the trial.

The effect of the District Court's judgment being to make nugatory, as between veteran and nonveteran employees, the seniority provisions of its collective bargaining contract, the Union appealed to the Circuit Court of Appeals. That Court, Judge Chase dissenting, reversed the judgment of the District Court and dismissed the petitioner's complaint.

Summary of Argument

Neither subsection (b) nor subsection (c) of Section 8 of the Selective Training and Service Act entitles a veteran, insofar as his right to continuous actual work is concerned, to an absolute priority over all nonveteran employees. Congress, by directing in subsection (b) that an employer shall restore a veteran "to such position [as he had when inducted] or to a position of like seniority, status and pay * * *", clearly demonstrated its recognition that

the position to which the veteran must be restored is one which may not have required the employer to afford the veteran employee continuous actual work. Any other interpretation would require an inference that Congress was oblivious of the facts which characterize our industrial system and would further require that the clear and significant language employed by Congress be strained. Nor did Congress, in subsection (c) of Section 8, guarantee to the veteran greater rights to continuous actual work for the employer than the veteran's original contract of employment, or original position with the employer, gave him. The generally recognized and accepted distinction between a "discharge" and a "lay-off" lends credence to the contention that Congress used the word "discharge" in Section 8(c) in the sense of a permanent and complete termination of the employer-employee relationship. This contention is further supported by the very language used in Section 8(c). In this case it has been established that the veteran was restored to his former position, that this was done without loss of seniority and that he was never discharged. The petitioner has, therefore, failed to make out any cause of action.

Even if the language of Congress be strained for the purpose of inferring an intent to include within the meaning of the word "discharge" a lay-off or shape-up, it is submitted that such "discharge" was, in the instant case, not without cause and, hence, was permissible under the Act. In the first place, Congress' language clearly indicates that, while it intended to guarantee to a veteran a restoration to his own job—or to a similar one—it did not intend to give him someone else's job, the result sought by the petitioner. Moreover, the validity of the cause for petitioner's discharge—if a lay-off may be so construed—is reinforced by the following uncontradicted facts: (a) that

the "shape-up" was made necessary by a contract which the National Labor Relations Act made it mandatory upon the employer to enter into and comply with; (b) that an arbitrator whose decision was legally binding upon the employer had ordered the employer to "shape-up" the veteran; and (c) that the clause under which the veteran was "shaped-up" was the result of a directive order by the National War Labor Board, which was constitutionally empowered to make such orders. The existence of these factors requires the conclusion that, if the veteran's "shape-up" was, indeed, a "discharge", it was a discharge for good cause within the meaning of the Act.

Finally, neither the legislative history nor the interpretations of Section 8(c) thereof issued by the Director of Selective Service in Memorandum 190-A support the petitioner's claim to a preference in employment in the face of the failure of the Act's clear language to grant such a preference.

ARGUMENT

I

The Provisions of Section 8 of the Selective Training and Service Act of 1940 Contain No Guaranty Against, and Do Not Make Unlawful, Occasional Temporary Losses of Work Suffered by a Veteran Restored to His Position, if Such Losses of Work Are in Conformity with His Agreement of Employment.

The contention of the petitioner in the court below—and we assume it will be reiterated here—was that the word "position" was used in Section 8 of the Act synonymously with "job" or "employment", and has significance only if it refers "to the veteran's actual employment and work status, and not merely [to] his standing in relation to other employees". The guaranty which Section 8 carries

against reduction in the restored veteran's seniority, is a benefit which Congress intended to confer upon the veteran in addition to restoration to his position, argued the petitioner, and may not be interpreted as limiting his right to continuous actual work on the basis of whether the veteran's seniority standing is less than that of nonveteran employees. Finally, the petitioner argued, the prohibition against a restored veteran's discharge during the year following his restoration to his position also demonstrated that it was the Congressional intent that during such year the veteran be kept actually at work and be given preference over nonveteran employees in allocation to the veteran of such work as is available. In the petitioner's view, the collective bargaining contract, whose provisions led up to the shaping up of the petitioner, was a contract between the employer and a third party which neither bound the petitioner nor measured his right to work on any day, nor constituted justification or cause to the employer for shaping up the petitioner.

It is obvious from the foregoings that petitioner bases on both subsection (b) and on subsection (c) of Section 8 of the Act his contention that he is entitled, as regards his right to work on any day, to an absolute priority over all nonveteran employees. It is the respondent Union's position that neither subsection (b) nor subsection (c), nor the two combined, grant the petitioner such priority.

1. *Subsection (b) of Section 8 Clearly Contemplates that the Position to Which the Veteran Must Be Restored Is One Which May Not Have Required the Employer to Afford the Veteran-Employee Continuous Actual Work.*

Subsection (b) provides that

"In the case of any such person who, in order to perform such training and service, has left or leaves

a position, other than a temporary position, in the employ of any employer * * *

"(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay * * *"

From the foregoing it is clear that whatever else may have been intended by Congress, the employer-employee relationship is required to be restored when the veteran makes application for reemployment. But, even if it be conceded as petitioner contended below, that the word "position" is synonymous with "job" or "employment", and has significance only if it refers to the veteran's actual employment and work status, there still remains the question of how much work the employer must, on any day, or during any week, assign to the veteran. The answer to that question is to be found, of course, in the agreement of employment out of which every employer-employee relationship flows, and which determines the conditions and characteristics of the position created by, or existing as the result of such employer-employee relationship. It is clear that the phrase "such position" used in paragraph (B) refers to the position, mentioned in subsection (b), which the employee leaves in order to perform the training and service required by the Act. Accordingly, the requirement of paragraph (B) that the veteran be restored to "such position" means that the veteran is to be accorded such rights as were created by the agreement of employment which he had when inducted. That agreement of employment, like many others, may have been one which entitled the employee to work of a given kind on every day on which such work was available in the employer's plant. On the other hand, like many similar agreements of employment, it may have bound the employer to give, and the employee

have promised to perform, work on only two days a week, all other similar work having already been promised to other employees in the latter employees' agreements of employment, and the veteran having desired to obtain only two days of work per week. Or, the veteran's agreement of employment may have been with an employer operating in a seasonal industry. Under such circumstances the veteran's agreement of employment may merely have embodied the promise that he would be assigned to work on each workday of the week during the peak season only, and that as the season waned, he would be assigned only such work as could not be performed by a small body of employees whose agreements of employment provided that they would be kept at work without interruption throughout the year. If such were the returning veteran's original agreement of employment, such also was the character of the position which he left in order to enter the armed forces and the position to which he is entitled to return upon discharge from the armed forces. Congress having directed that the veteran be restored to such position as he held when inducted, that direction cannot be held to require that the veteran be given more actual work than he had agreed to accept and the employer had agreed to assign in connection with the position created by their agreement of employment.

To ascribe to Congress an intention other than that above described would imply that Congress was oblivious of the actual facts characterizing our industrial system; that Congress did not know that hundreds of thousands, indeed millions, of positions "other than temporary" were either part-time positions or seasonal positions; or at least that Congress intended either to give employees who held such positions no right to be restored to such positions, or to expand the rights attaching to such positions beyond the

scope originally agreed upon by the employee and employer. Such suppositions cannot find support in fact and must be rejected. That this is so is shown by further analysis of subsection (b).

Subsection (b) gives the employer the right to restore the veteran either to the position which he originally held, or "to a position of like seniority, status, and pay * * *". The conditions under which a substitute, like position may be granted to the veteran, instead of the position originally held by him, are not specified; the employer's freedom of action in this respect is preserved. The substitute position must, however, be like, that is, the same as, the original position in respect of three characteristics: Seniority, status, and pay. In this provision we find a clear indication that Congress understood and made provision for the fact that the original position from which the veteran had been inducted had, as one of its characteristics, that of seniority. The term "seniority," having been used by Congress, must be presumed to have been used by it in the meaning commonly ascribed to it. That meaning is not at all uncertain.

> "'Seniority' represents in the highest degree *the right to work*, and by seniority the oldest man in point of service, ability and fitness for the job being sufficient, is given choice of jobs, is first promoted within the range of jobs subject to seniority, *and is the last laid off*, proceeding so on down the line to the youngest in point of service." (Emphasis supplied.)
>
> *Dooley* v. *Lehigh Valley Railroad Company*, 21 A. (2d) 334, 338, 339 (New Jersey).

> "'Seniority' * * * means that the employee who enters the service of a railway * * * on a specified division on a certain date must be preferred to the one who enters the same service at a later date. *If the* * * *

is slack so that fewer men are needed, the one hired last is laid off first." (Emphasis supplied.)

Geo. T. Ross Lodge, etc. v. *Brotherhood of Railroad Trainmen*, 254 N. W. 590 (Minn.)

"'Seniority' as used in determining employee's right to continued employment as against rights of another employee comprehends length of period of service in office or entrance upon an office ant rior to that of another."

Unkovich v. *New York Central Railroad Company*, 16 A. (2d) 558, 560 (New Jersey).

"'Seniority,' as applied to trainmen, means that a man shall be entitled to preference in matter of choice of, *and right to work* in his occupation in accordance with length of time he has been employed * * *" (Emphasis supplied.)

Grand International Brotherhood of Locomotive Engineers v. *Mills*, 31 P. (2d) 971, 979 (Arizona).

Thus we find that Congress understood and provided for the contingency that the original position which the veteran had held was likely to be one which did not, under the agreement of employment, guarantee continuous actual work. For, in using the word "seniority," Congress was merely availing itself of a normal, linguistic convenience—the use of a single word as a symbol for a somewhat complex concept; in this instance, the concept embodied those characteristics of the veteran's position which dealt with the amount of work which was to be assigned to him, his right to share in such work as was available, the order in which such sharing was to be done among employees, etc. The fact that Congress, instead of directing that these characteristics of the veteran employee's original position should be ignored, and instead of using apt words to embody such direction, stipulated that such characteristics be retained in the substitute position which the employer was

left free to give the veteran in the place of his original position, shows conclusively that the petitioner's contention finds no support in subsection (b) of Section 8.

The petitioner—as also the dissenting judge in the court below—made much of the fact that in the case at bar the restored veteran would be deprived of the opportunity to work on every day on which work was available solely by reason of the fact that "someone," "some third party," had a contract with the employer which so required. This argument, of course, overlooks the fact that the seniority rights and disadvantages which Congress envisaged might attach to the veteran's original position, could have resulted from the explicit, perhaps even written, agreement of employment between the veteran and the employer. It would appear from the petitioner's and the dissenting judge's arguments that to such a situation they would not apply the contention that restoration of the veteran to his position required that he be kept actually and continuously at work in preference to other employees. This in itself shows that such contention is untenable. Even, however, if there were some color of support for the petitioner's contention that the employer's contract with a "third party" should not affect his right to be given continuous actual work, such contention would not be applicable to the facts in the case at bar, nor to the facts in the majority of similar cases. The "third party" in this and in the vast majority of similar cases, is a union, lawfully certified as the exclusive representative and agent of all the employer's employees for purposes of determining by contract with the employer the terms and conditions of employment to be granted to the employees. In other words, the respondent union was in this case the petitioner's alter ego. The contract which it made with the employer was made, in part, on the petitioner's behalf and was inescapably and wholly incorporated in his individual agreement of employment.

J. I. Case Company v. *N. L. R. B.*, 321 U. S. 332. Accordingly, when the Corporation restored the petitioner to his position and seven months thereafter shaped him up or laid him off for a day or two, it gave him no less than Congress had intended he should have—those rights as respects continuity of actual work which he had in the position he left at the time he was inducted.

2. *Subsection (c) of Section 8 Does Not Guarantee to the Veteran Greater Rights to Continuous Actual Work for the Employer than the Veteran's Original Contract of Employment—or Original Position with the Employer—Gave Him.*

Subsection (c) of Section 8 of the Act reads as follows:

> "(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored *without loss of seniority*, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and *shall not be discharged* from such position without cause within one year after such restoration." (Emphasis supplied.)

In the court below the petitioner attempted to justify his claim that he should not have been "shaped up" not only on the ground that the word "position" meant continuous actual work, but also on the ground that the prohibition of discharge from such position, contained in subsection (c), applied equally to any failure of the employer to assign work to the petitioner on any day on which there was welding work to be done in the Corporation's shipyard. In other words, the petitioner argued that "discharge" and

"shape-up" or lay-off are synonymous. The majority of the court did not accept this argument, but the dissenting judge not only adopted it but even went so far as to say,

> "To deny the veteran the right to work in that position during the year is a 'discharge' from it for the period of his deprivation and calling such action a 'lay-off' or anything else one may choose for a name neither alters the act nor justifies the action. Such a choice of labels is simply what should be recognized as a futile attempt to circumvent the statute."

It is respectfully submitted that in their zeal both the petitioner and the dissenting judge ascribed to the word "discharge" a meaning in which it is never used and which the language of subsection (c) itself demonstrates that Congress could not have intended.

The ordinary and universally accepted meaning of the word "discharge" is a permanent termination of the employment relationship. Thus the Oxford Dictionary defines "discharge" to mean: "to relieve of a charge or office: (more usually) to dismiss from office, service or employment; to cashier." "Discharge" has also been defined to mean "that the employer no longer needs or desires the employee's services, and that all contractual relations between them are terminated." *Stitt* v. *Locomotive Engineers' Mutual Protective Association*, 142 N. W. 1110, 1113 (Mich.). "A 'discharge' is the termination of employment at the will of the employer with prejudice because of some fault on the part of the worker." *International Association of Machinists* v. *State, ex rel. Watson*, 15 So. (2d) 485, 490 (Fla.).

Lay-off, on the other hand, is defined in the Oxford Dictionary as "a period during which a workman is temporarily dismissed or allowed to leave his work; that part of season of the year during which activity in a particular

business or game is partly or completely suspended; an off-season."

An exhaustive and carefully documented treatise on Section 8 of the Act is to be found in 54 *Yale Law Journal* 417 (March, 1945). At page 425 of the article cited will be found the following:

> "Even if it be assumed that the reemployment right is unqualified, the further inference that there is a virtual one-year immunity against lay-off, although a necessary buttress to absolute priority, is more than the statutory exemption from discharges 'without cause' requires. Such a construction ignores a distinction clearly understood and carefully guarded in industry, and presumably recognized by Congress, between 'discharge,' an extreme form of discipline, and 'lay-offs,' which are recognized as normal incidents of business recession during which seniority rights often are retained or accrue."

It is also highly significant that an arm of the Federal Government whose very existence is justified by its expert knowledge of industrial practices and of industrial terminology, makes the same distinction between "discharge" and other forms of temporary loss of work. In its Bulletin No. 686, "Union Agreement Provisions," the Bureau of Labor Statistics of the United States Department of Labor captions Chapter 16 (page 125), "Lay-off and Reemployment" while it captions Chapter 18, "Discharge and Quits."

> "Is 'discharge' synonymous with 'lay-off'? Discharge is universally recognized as meaning to terminate employment, whereas lay-off means to suspend or cause to cease work for a time. The courts have recognized that difference in these words as does the dictionary. See 24 Words and Phrases 447; Teller on Labor Disputes and Collective Bargaining, Vol. 2, Sec. 276, p. 753; *North Whittier Heights Citrus Association*

v. *N. L. R. B.*, 109 Fed. (2d) 76; *Waterman Steamship Co.* v. *N. L. R. B.*, 309 U. S. 206." Arbitration Award by Dudley E. Whiting, *In re Dow Chemical Co.*, and *International Union, United Automobile, Aircraft, Agricultural Implement Workers of America*, 17 Labor Relations Reporter 646."

The general recognition by the authorities of the distinction between "discharge" and "lay-off" would seem to give ample indication that Congress used the word "discharge" in subsection (c) in the sense of a permanent and complete termination of the employer-employee relationship. However, Congress itself gave evidence, contained in subsection (c), that it fully understood the difference between "discharge" and other forms of loss of work.

Section 8(c) provides that the veteran restored to his former position "shall be entitled to participate in insurance and *other benefits* offered by the employer pursuant to *established rules and practices* relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces * * *" (Emphasis supplied). In the same sentence of Section 8(c) is contained the further provision that the veteran shall be restored to his position "without loss of seniority." In other words, Congress directed that as to insurance and other benefits the restored veteran's rights should be governed by the employer's "established rules and practices" as to such benefits, and at the same time provided that the veteran should be restored to his position "without loss of *seniority*." It is thus obvious that in using the word "seniority" Congress must have meant that the benefits governed by seniority were different from the "other benefits" governed by other "rules and practices." What phase of the employment relation did Congress deem to be governed by "seniority"? Why did it provide against the restored veteran's loss of "se-

niority"? Congress could not have intended that "seniority" govern the order of "discharge," since as to "discharge" Congress itself provided a governing rule in Section 8 (c)—that a "discharge" could not be made except for cause. Equally Congress could not have intended that "seniority" govern insurance and similar benefits since it provided that such benefits be governed by "established rules and practices." The remainder of the area of employer-employee relationship to which the word "seniority" as used by Congress can apply is therefore the restricted area of transfer, promotion and *lay-off*. *Dooley v. Lehigh Valley Railroad Co., supra* and *Geo. T. Lodge, etc. v. Brotherhood of Railroad Trainmen, supra.*

Thus we see that Congress in protecting the veteran's seniority, knew of the existence of, and was providing for, the possibilities of lay-off. Accordingly Congress could not have used the word "discharge" in a sense which would make it applicable to a lay-off. Furthermore, since the loss of seniority against which Congress sought in subsection (c) to protect the veteran was loss of seniority in the position to which he was "restored," i. e., in his original position, it must follow that Congress was aware that such original position carried with it the possibilities of lay-offs and other types of temporary absence from actual work. It would, to say the least, have been highly inconsistent of Congress to intend that the veteran should be restored to a position in which breaks in the continuity of actual work might occur and yet to forbid the employer to permit such interruptions of continuous work. That the word "discharge" was not used in a meaning which would result in such inconsistency is further demonstrated by the reference in subsection (c) to benefits to be enjoyed by employees on furlough or leave of absence. That provision clearly indicates that Congress realized that the employer-employee relationship was not terminated, the employee was not deprived of

his position, simply by reason of absence from, or lack of actual work. In short, neither the requirement of subsection (b) that the veteran be restored to his original position or one of like seniority, nor the prohibition of the veteran's discharge without cause, creates any rights in the veteran in respect of the amount of actual work to be accorded him greater than the rights which his agreement of employment gave him, except insofar as the work made available to him depended upon continuance of the employer-employee relationship; that relationship alone the employer cannot, under subsection (c), terminate except for cause.

In the court below the petitioner argued that unless the strained and unnatural denotation for which he contended were given to the word "discharge", an employer might make nugatory the protection which Congress sought to give the veteran in his right of reemployment by refusing to assign actual work to the veteran immediately after the latter's restoration to his position. The prohibition against discharge contained in subsection (c), argued the petitioner, could only have meaning if the restored veteran was given work on every day on which work was available at the employer's plant. At the same time, petitioner conceded that if no work was available then the prohibition against discharge did not apply to the employer's failure, for short temporary periods, to assign work to the veteran. By this argument petitioner sought to obtain what he considered a benefit for himself. It is respectfully submitted, however, that in attempting to obtain this benefit, the petitioner used reasoning which went much too far and proved much too much. If, in order to protect the petitioner's right to work, it is necessary to give the meaning he contends for to the word "discharge", then it would be equally justifiable to hold that a shut-down by the

employer of his plant because the employer cannot, under such contracts as he holds or can obtain with his customers, make a profit, is equally a discharge without cause as the petitioner contends was his shape-up or law-off in the case at bar. For that lay-off was the result of the employer's need for operating under a contract which, as much as the price provisions in the employer's contract with customers, determines the possibilities of profitable operation of the employer's enterprise. It is difficult to conceive that Congress intended, or believed it had the power, to require a private citizen or corporation to continue operation of a business at a loss in order to afford continuous work to a veteran.

To give the word "discharge", as used in subsection (c), its commonly accepted meaning, does not deny to the veteran any benefit which Congress can reasonably be supposed to have intended for him. Subsection (c) seeks to protect the veteran's rights to participate in insurance and other benefits offered by the employer. Such other benefits might be in the nature of continued payment of wages during periods of the employee's illness, or the right to receive payments in lieu of wages upon permanent discharge. Such payments not uncommonly are quite substantial in amount, equalling as much as a half year's wages. (Chapters 8 and 14, "*Union Agreement Provisions*", Bulletin No. 686, U. S. Department of Labor; "*Collective Bargaining Negotiations and Contracts*", Division 35, p. 101, et seq. Bureau of National Affairs.) In other words, these benefits frequently are of much more significance to the employee than the benefit flowing from actual continuous assignment to work. Yet the restored veteran's right to participate in these benefits is made to depend upon the "established rules and practices * * * in effect with the employer * * *." The veteran is given

no preference over other employees and no benefits greater than those afforded by the employer's perhaps unilaterally established rules and practices. If Congress did not intended to grant such preference or greater benefit to the veteran in respect of these frequently more important rights it is difficult to believe that it intended to grant to the veteran, as to the frequently less important right of actual work in his job, the expanded benefits and preferential treatment for which the petitioner contends. This difficulty becomes the greater when it is remembered that seniority rights are almost always the creatures of collective bargaining agreements made for the employees—including restored veterans—by their own freely chosen agents or representatives for that purpose, their labor union. The zeal of Congress to benefit the veteran thus cannot be used as the basis for an inference that Congress used the word "discharge" in a meaning which would prohibit a lay-off of the veteran.

Thus, from the language of Section 8(c) of the Act it is clear that by the word "discharge" the Congress meant permanent severance of employment. In the case at bar, however, no showing whatsoever was made that there had at any time been a permanent severance of the petitioner's employment by the Corporation. On the contrary, the uncontradicted evidence was that the petitioner was never discharged. The witness Leighton, the petitioner's foreman, denied that he had ever discharged the petitioner (R. 83); the petitioner himself stated that he was still employed by the Corporation, that he had never been notified that his services were no longer needed (R. 80), and that he did not consider himself discharged when he *was* "shaped up" (R. 81). Even if this testimony is considered to be in the nature of conclusions of law and fact, there is still ample additional evidence in the record

that the "shaping up" of the petitioner cannot conceivably be considered as being a discharge, or permanent termination of the petitioner's employment, since his "shaping up" had none of the characteristics or consequences of a permanent termination of employment. Thus, petitioner was not given nor did he seek a release on the days he was "shaped up" (R. 81); deductions for his social security and other taxes continued (R. 81); he was not required to surrender his identification badge, or to remove his tools from the employer's premises (R. 87); and on again being assigned to work he was not required to fill out a new application for employment (R. 87).

Accordingly, the only conclusion that can be drawn in this case is that since petitioner admits he was restored to his former position, since he further admits that not only was this done without loss to him of any of his seniority, but that such seniority was zealously safeguarded both by the provisions of the collective bargaining contract, and by the employer's observance of seniority in making "shape-ups", and since he admits and the evidence establishes that he was never discharged, he failed to make out any cause of action.

II

Even if Loss of Work for One or More Days, Without Termination of the Employee Status, Be Considered as a "Discharge" Under Section 8 (c) of the Act, There Was Cause for Such "Discharge" in the Instant Case.

It is the writer's sincere opinion, borne out by the background and circumstances of this case, as well as by the brief submitted by the petitioner to the court below, that the contention that "discharge" as used in Section 8(c) of the Act applies to a "shape-up" would not even have occurred to anyone, if it had not been for the issuance by

the Director of Selective Service of the so-called Local Board Memorandum 190-A. The opinions of the Director of Selective Service as expressed in that memorandum are therefore the actual basis for the bringing of this action. We shall, however, postpone consideration of whether those opinions have any validity or are entitled to any weight until a later point. Let us first consider whether, viewed in a light uncolored by the opinions expressed in Local Board Memorandum 190-A, the language of Section 8 (b) of the Act affords any basis for a contention that even if the petitioner's "shape-up" be considered a "discharge," such "discharge" was without cause.

In this connection, the first step of inquiry should be to ascertain just what it was that Congress sought to give to a veteran honorably discharged from the armed forces. The answer to this inquiry is to be found in paragraph (B) of Section 8 (b) of the Act. That paragraph provides that if the position held by an employee inducted into the armed forces

> "* * * was in the employ of a private employer, such employer shall *restore* such person to *such position* or to a position of like seniority, status, and pay * * *" (Emphasis supplied.)

This language clearly indicates that Congress sought to obtain for the veteran a restoration to his own job—or to a similar one—but not to someone else's job. In the instant case the complaint and the proofs both allege that the petitioner was returned to his own job by the employer. The uncontradicted proofs are to the further effect that the employer had on its payroll another employee, G. Jackerson. And finally the uncontradicted proofs are that on the basis of the collective bargaining contract into which the Corporation entered with the Union some eight months before the petitioner was even hired, the employee, Jackerson, held

a job which entitled him to be assigned to work in preference to employees junior in length of service with the Corporation. The provision of the collective bargaining contract which created this right in the employee, Jackerson, and the concurrent obligation upon the Corporation, remained in substance the same in the new collective bargaining agreement executed before the petitioner was restored to his position. The petitioner's complaint that he, and not Jackerson, was "shaped up" is thus, in effect, a claim that the petitioner should have been given Jackerson's job, despite the employer's contractual obligations to Jackerson. But we have seen that subparagraph (B) of Section 8 (b) of the Act requires merely that petitioner should have been restored to his own job—not that he should be given the job of another employee. In this case the employer insisted upon giving the petitioner that which Congress commanded that he be given and refused to give petitioner that which Congress did not direct that he be given, the result being the "shaping up" of the petitioner. It must certainly be clear that a "shape-up" or a "discharge" so caused, i. e., by the employer's granting the restored veteran that to which he is entitled and refusing to grant him more, cannot be called a causeless "discharge."

There are additional reasons for considering the "shaping up" of the petitioner to have been for excellent cause. The National Labor Relations Act provides that

> "Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *". (U. S. C. Title 29, Sec. 159(a)).

This Court has interpreted the National Labor Relations Act as requiring that an employer enter into a written contract with the Union designated as such exclusive representative (see *J. H. Heinz Co.* v. *N. L. R. B.*, supra). Pursuant to this congressional enactment, as interpreted by this Court, the Corporation entered into collective bargaining contracts with the Union which stipulated, among other conditions of employment, the rules governing "shape-up." It has been held by the National Labor Relations Board, and by the courts that breach of the terms of such a contract by an employer will, under certain circumstances, constitute the commission of one of the unfair labor practices prohibited by Section 158 of the National Labor Relations Act. *In the Matter of Hughes Tool Co. and United Steelworkers of America*, 56 N. L. R. B., 981 (1944), enforced in *Hughes Tool Co.* v. *National Labor Relations Board*, 147 Fed. (2d) 69 (1945). See also footnote 40 at page 427 of the article in the Yale Law Journal cited above. Furthermore, as held in *Droste* v. *Nash-Kelvinator Corp.*, decided January 30, 1946, U. S. D. C., E. D. of Mich.,

> "There is no reason to believe that Congress intended to amend or repeal any part of the National Labor Relations Act when it passed the Selective Training and Service Act. 'No parts of the former Act are specifically repealed by the latter, and repeals by implication are not favored. *U. S.* v. *Borden Co.*, 308 U. S. 188.
>
> "The sections of the Selective Training and Service Act involved herein, like the National Labor Relations Act, are intended to protect the interest of the employees, and there is no positive repugnancy between the provisions of the new law and those of the old, and by a reasonable construction effect can be given to both Acts. *U. S.* v. *Borden Co.*, 308 U. S. 188, 198; *Walling* v. *Patton-Tulley Co.*, 134 F. (2) 945, 948."

The uncontradicted evidence in this case is, therefore, that the petitioner's "shape-up" was made necessary by a contract which an Act of Congress made it mandatory upon the Corporation to enter into and to comply with, under penalty of having imposed upon him the sanctions provided for in such Act. Assuredly it cannot be said that a "shape-up" or "discharge" so brought about was without cause.

In connection with the foregoing it is also to be noted that the Corporation did not "shape-up" petitioner until an arbitrator had made an award requiring the Corporation to do so. Such award was, by the terms of the collective bargaining contract, "final and binding upon all the parties" to the contract. This award was enforceable in a court of law.

It might be argued that before the Corporation complied with the award, it should have permitted a court to determine whether, under Section 8(c) of the Act, the award was cause for a discharge or "shape-up." This argument loses sight of the fact that the Corporation was under a duty to the nation, and to the government agency from whom it held its contracts to repair United States vessels, to see to it that nothing it did would bring about a cessation of production, and that disregard of the collective bargaining contract to the extent of ignoring an arbitrator's award rendered thereunder would be the most fruitful cause of strikes and work stoppages.

Furthermore, it must be assumed that the Corporation was cognizant of the numerous decisions of the National War Labor Board holding that the right to litigate disputed questions of law was not one to be exercised by an employer during the war emergency. *In re Chicago Transformer Corporation and United Electrical, Radio and Machine Workers, Local 1150*, 14 War Labor Reports 666 (1944).

The petitioner's "shape-up" having been brought about by an arbitrational award of the character and under the circumstances described must clearly be held to have been for cause.

There is still a further ground on which it must be held that petitioner's "shape-up" was for cause. The uncontradicted testimony and evidence in this case shows that the clause of the collective bargaining contract which required that "shape-ups" be made in accordance with the length of service of the Corporation's employees was incorporated in such contract by virtue of the Directive Order of the National War Labor Board dated February 25, 1944 (R. 67; Defendant's Exhibit "A"). Such Directive Order was issued pursuant to the authority and the power granted to the National War Labor Board by the War Labor Disputes Act of June 25, 1943, Public Law 89, 78th Congress, First Session.[1] At the time petitioner was "shaped up" it was common knowledge throughout the length and breadth of the country that in numerous instances failure on the part of an employer to comply with a Directive Order of the National War Labor Board and with the terms of a collective bargaining contract embodying such Order had been followed by governmental seizure of the employer's plant. It must be assumed that this employer also was possessed of this knowledge.

It must further be assumed that the employer was equally familiar with the numerous decisions of the National War Labor Board holding that Section 8 (c) of the Act did not

[1] Sec. 7 (a) of this Act provides: "The National War Labor Board * * * shall have the following powers and duties:

"(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of * * * the National Labor Relations Act: * * *"

grant to a restored veteran any greater seniority than required by the collective bargaining contract, and did not set aside the seniority provisions of a collective bargaining contract: *In re Sullivan Dry Dock and Repair Corporation and Local 13, I. U. M. S. W. A.*, 14 War Labor Reports 283 (1944); *In re Scoville Manufacturing Co.*, 21 War Labor Reports 200 (Dec. 19, 1944); *In re Bendix Aviation Corp.*, 21 War Labor Reports 145 (Jan. 19, 1945).

Thus the employer, in "shaping up" the petitioner, was acting pursuant to the mandate of a federal agency created by the President and the Congress, and clothed by them with authority in the premises through Executive Order and statutory enactment flowing to an equal extent with Section 8 of the Act out of the constitutional war powers. It must be held that the "shape-up" so brought about, if it was a "discharge," was for ample cause.

III

Neither the Legislative History of the Act Nor the Interpretations of Section 8 (c) Thereof Issued by the Director of Selective Service in Memorandum 190-A Support the Petitioner's Claim to a Preference in Employment in the Face of the Failure of the Act's Clear Language to Grant Such Preference.

In the court below petitioner laid great stress upon the Congressional intent, as expressed in the debates and Committee consideration of the Act, and as indicated by the fact that Congress, in 1944, extended the life of the Act after knowledge that the Director of Selective Service had expressed the same opinion concerning the meaning of Section 8 as the petitioner ascribed to it. Petitioner further urged upon the court below that it should give determinative weight to such opinion of the Director of Selective Service. It is our purpose to show that neither of these

contentions of the petitioner should prevail over the clear and unambiguous language which Congress used in Section 8.

1. *The Legislative History of the Act Does not Support the Petitioner's Contention.*

The perspective in which the history of the Act must be viewed is aptly expressed in the majority opinion of the court below (R. 185):

> "When we consider the situation at the time that the Act was passed—September, 1940—it is extremely improbable that Congress should have meant to grant any broader privilege than as we are measuring it. It is true that the nation had become deeply disturbed at its defenseless position, and had begun to make ready; but it was not at war, and the issue still hung in the balance whether it ever would be at war. If we carry ourselves back to that summer and autumn, we shall recall that the presidential campaigns of both parties avoided commitment upon that question, and that each candidate particularly insisted that no troops should be sent overseas. The original act limited service to one year, and it was most improbable that within that time we should be called upon to fight upon our own soil; as indeed the event proved, for we were still at peace in September, 1941. Congress was calling young men to the colors to give the man adequate preparation for our defense, but with no forecast of the appalling experiences which they were later to undergo. Against that background it is not likely that a proposal would then have been accepted which gave industrial priority, regardless of their length of employment, to unmarried men—for the most part under thirty—over men in the thirties, forties or fifties, who had wives and children dependent upon them. Today, in the light of what has happened, the privilege then granted may appear an altogether inadequate equivalent for their services; but we have not to decide

what is now proper; we are to reconstruct, as best we may, what was the purpose of Congress when it used the words in which § 8(b) and § 8(c) were cast."

The petitioner's brief in the court below quoted a number of statements made by participants in the Congressional debates which would seem to afford some foundation for his contention. However, equally numerous statements by Congressmen and Senators are to be found which, with as great a degree of cogency, support the opposite view. The truth of the matter, as a reading of the debates and of the Committee hearings will demonstrate, is that relatively scant attention was given by Congress to Section 8 of the Act.[2]

The difficulty with the argument advanced by petitioner and the opinions expressed by the Director of Selective Service is that they represent thinking appropriate to a time when countless sacrifices of life and limb had been made during years of a cataclysmic war, and when sympathy for, and gratitude to, the veteran were boundless and made almost any reward that might be granted to him seem inadequate. Furnishing a reward to the battle-scarred veteran of foreign wars was not, however, the function of the Act; its purpose was primarily the training of civilians for military service rather than provision for problems that would arise after termination of the war.

"To hold that Congress was intending by this Act to confer such an advantage [as absolute work priority] to the serviceman, in my judgment, goes beyond the express provisions of the Act and would not be warranted under ordinary rules of construction. Congress by a later Act, World War II, Servicemen's Readjustment Benefits (G. I. Bill of Rights) 38, U. S. C. A. 693, et seq., conferred advantages on the serviceman far beyond the civilian. By the Selective Service and

[2] See 54 Yale Law Journal, 417 at 418, Note 8.

Training Act, however, they were undertaking to establish the machinery for a 'fair and just system of selective, compulsory military training and service' and to that end provided in Section 8 of the Act that no handicaps should be placed on one in his employer-employee relationship by reason of his leaving his employment for military service. His status quo with accumulated seniority was provided for and definitely preserved; he was to suffer no handicap in his employment relation by reason of his military service; in short, he was to get his own job back if it was in existence—not to get the job of another with longer years of service. • • • The argument goes that it was thus the intention of Congress to give the returning veteran an advantage over his former fellow workmen and that such advantage is no more than a just reward for a patriotic service nobly performed. Without minimizing the great respect and lasting obligation all are under to those who bore the brunt of military service, yet we are not to be carried away in this hour of triumph, and in our zeal to show our appreciation to the returning veteran perforce to be led into a construction of the Act that holds such potentialities of chaos in industrial relations."

Olin Industries, Inc., v. *Joseph Barnett, Roy Slaten, et al.*, decided January 24, 1946 (U. S. D. C. S. D., Ill.)

The considerations and sentiments which move petitioner and others who hold with him to press for the adoption of their interpretation of Section 8 of the Act were not those which motivated Congress when it enacted the Statute; to read such considerations into the Congressional debates and to argue that they indicate the intention ascribed to Congress by the petitioner is anachronistic. At best, this phase of petitioner's argument is an attempt to obtain by the short-cut method of judicial leigslation rewards for the veteran which Congress has not enacted.

2. The interpretations of Section 8(c) of the Act contained in Local Board Memorandum 190-A have no legal status, are contrary to the language and the legislative history of the Act, would make the Act conflict with other laws, and should be given no weight by the Court.

We have already indicated that the only support for the petitioner's contention emanating from any official or semi-official source is apparently Local Board Memorandum 190-A. We shall now turn to an examination of the weight, if any, which this Court ought to lend to such Memorandum.

It is to be remembered, in the first place, that the Director of Selective Service is not charged with the enforcement of Section 8(c) of the Act, and has no power or responsibility with respect thereto, except "to render aid in the replacement in their former position of, or in securing positions for" veterans. In the fulfillment of the latter function, the Director of Selective Service is given no power to make rules for the administration, or to make interpretations of the Act (Sec. 8 (g) of the Act.)[3]

Where an agency issuing interpretations of an Act has no implied or express statutory authority so to do, it is well settled that such interpretations would carry little weight in the courts. *United States* v. *Stewart*, 311 U. S. 60 (1940). Similarly, informal interpretations of an Act, such as those contained in Memorandum 190-A, are relied on only to a very slight extent, if any, by the Courts. *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455 (1934).

Nor were the interpretations contained in Memorandum 190-A contemporaneous with the enactment of the legis-

[3] Indeed, Selective Service Headquarters concedes as much, since Memorandum 190-A, Section 1, states that "interpretation of the meaning and significance of [the reemployment] provisions is, in the last analysis, a matter for determination by the courts".

lation, Memorandum 190-A having been issued more than three and one-half years after passage of the Act. This delay in the issuance of Memorandum 190-A, and of the informal interpretations contained therein, places the Memorandum outside of the normal rule that administrative interpretations issued contemporaneously with the enactment of a statute are to be given weight by the courts, and makes applicable the principle that the failure of an administrative agency to assert authority to issue rules and interpretations is a significant indicator that authority to do so was never actually conferred. *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 352 (1941).

On these grounds alone it is respectfully submitted that your Honorable Court should not accept the interpretations contained in Memorandum 190-A.

It might be argued that even though, under the foregoing authorities, the Court is not constrained to give major weight to the interpretations contained in Memorandum 190-A, nevertheless the Court should in part at least be guided by these interpretations as coming from an agency which presumably must have made expert study and attained large experience of the problems arising out of Section 8(c) of the Act, by virtue of the fact that such agency is entrusted with the duty of aiding veterans in obtaining their rights under the Act.

On a number of grounds such argument will not bear scrutiny. Selective Service Headquarters cannot have had any extensive experience with problems of administering Section 8(c), because it is only recently that veterans in any large numbers have been released from the armed forces. Again, the interpretations upon their face show a lack of thoughtful, objective, and careful study of the problems involved. Thus, sub-section (b) of Section 4

of Part IV of Memorandum 190-A, upon which petitioner places his reliance in this case, reads as follows:

> "(b) A veteran who has been reinstated to his former position cannot within one year be displaced by another on the ground that the latter has greater seniority rights. To permit such displacement would be to nullify the original reinstatement and thus deprive the veteran of his reemployment rights under the act, and would be, in effect, a repeal of an Act of Congress."

It is obvious that this interpretation cannot be uniformly applied; it contains within itself the seeds of unresolvable conflict. Suppose, for example, that two veterans of a given employer originally hired at different times, and restored to their positions at different times, find themselves in a situation, within one year of their restoration, where the work available for them in the employer's plant is sufficient to keep only one of them fully employed. Under the above quoted sub-section of Memorandum 190-A the greater seniority of one veteran could not be used as a criterion for determining which veteran was to be retained in employment. The selection by the employer of either veteran for retention in his position would give rise to a claim by the other that he had been deprived of his reinstatement rights without cause.[4]

The contradictory character of the interpretations contained in Memorandum 190-A is particularly marked when those interpretations are sought to be applied in the instant

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[4] Numerous additional frailties in, and impossibilities of uniform application of the interpretations of Memorandum 190-A could be pointed out. For some of these examples, as well as for a discussion of other frailties of Memorandum 190-A, see the brief amicus curiae, filed in this case by the Congress of Industrial Organizations.

case. Sub-section (a) of Section 4 of Part IV of Memorandum 190-A reads as follows:

> "4. Employment for one year.—(a) A veteran entitled to reemployment may not be discharged from his restored position 'without cause within one year after such restoration.' What is 'cause' for dismissal in any case must be determined by the facts and circumstances in each case. The question is to be determined by standards of common sense and is to be measured by practices and customs generally acceptable in industry or practices and customs in common and accepted use in the particular place of employment."

The petitioner's contention in this case boils down to an argument that his "shape-up" was a "discharge", and that that discharge was without cause. Yet the above quoted subsection clearly states that what constitutes cause for discharge is to be determined by standards of common sense, and is to be measured by practices and customs generally acceptable in industry or in the particular place of employment. Thus, even if it were conceded that a "shape-up" is a discharge, subsection (a) of Memorandum 190-A would itself deprive the petitioner of any right of action. For the "shape-up" and the use of seniority to determine the order in which employees are to be "shaped up" are shown by the uncontradicted testimony and evidence in this case to be "practices and customs generally accepted in industry" and "in common and accepted use in the particular place of employment" of this petitioner. Yet subsection (b) would require that these generally accepted practices and the accepted usage in the petitioner's place of employment should not be held to be good cause for his "shape-up".

Common sense would dictate that interpretations so inconsistent and illogical, and so incapable of uniform application should be rejected by the courts as guideposts

of statutory construction. In this instance, common sense is supported by judicial authority. *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1 (1932); *McCann* v. *Retirement*, 331 Ill. 193, 162 N. E. 859 (1928); *Skidmore* v. *Swift*, 323 U. S. 134.

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The interpretations of a statute issued by an administrative agency are, under the commonly accepted rule, accorded weight by the Courts where the statutory provisions, interpreted are ambiguous, and where such interpretations would be consistent with the general legislative purpose or scheme revealed by the statute. It is respectfully submitted that in this case the facts and circumstances are not such as to permit this rule to be brought to the support of petitioner's effort to have this Court adopt the interpretations of Memorandum 190-A. The chief reason is that Section 8(c) of the Act is not ambiguous; added to this is the fact that the interpretations are not consistent with the legislative scheme or purpose revealed by the Act.

What has already been said at pages 9 to 14 above demonstrates, we believe, that there is no ambiguity in Congress' use of the word "discharge" in Section 8(c) of the Act. The C. I. O.'s brief amicus curiae ably demonstrates that the general scheme which Congress had in mind for the reemployment of veterans was to afford such veterans preservation of the job advantages and rights which existed at the time they entered the armed forces.[5] That this was Congress' purpose is also demonstrated by the legislative history of the Act, as discussed in the brief amicus curiae of the C. I. O.

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[5] In this connection see also Professor Herman L. Gray's arbitral award and opinion in the case of *Timken Roller Bearing Co. and United Steel Workers of America*, 16 War Labor Reports 482.

Memorandum 190-A itself clearly shows, however, that it seeks to gain for the reinstated veteran greater advantages and rights. Thus, the interpretations contained in Memorandum 190-A need not be adverted to by the Court, since the statute is unambiguous. If the interpretations are adverted to by the Court, they should be disregarded, since those interpretations are contrary to the clearly indicated legislative purpose. Memorandum 190-A indeed seeks to ascribe to Congress a purpose whose mere mention is revolting to any sense of justice, and which Congress itself would be the first most vehemently to disavow. In sub-section (B) of Section 8(b) of the Act Congress showed its solicitude not to impose upon the veteran's employer the burden of furnishing employment if the employer's circumstances had changed so as to make it unreasonable to require restoration of the veteran to his position. Memorandum 190-A, however, would have the Court hold that Congress had no such solicitude for non-veteran employees, since upon them—rather than upon the employer or society as a whole—would be imposed the burden of giving employment to the veteran by surrendering their own means of earning a livelihood for themselves and their dependents. Congress and the President, through governmental agencies such as the War Manpower Commission, required the non-veteran employee to contribute to the war effort by remaining at his war-production tasks. This contribution to the war effort was in hundreds of thousands of instances accompanied by loss of life and limb, just as was support of the war effort through service in the armed forces. It would indeed be a strange kind of justice which would prescribe that citizens who supported the war effort in one manner required by Congress shall be punished for so doing by having shifted to them, from the shoulders of society as a whole and of the employer, the burden of subsidizing, through surrender of their jobs, other citizens

who supported the war effort in another manner prescribed by Congress. Such discriminatory treatment as between the employer and the non-veteran employee cannot and should not be ascribed to Congress and to the Act. Such discrimination would result in injustice and undue hardship, and this Honorable Court should, therefore, not adopt the interpretations contained in Memorandum 190-A. *United States* v. *Jackson*, 280 U. S. 183.

A further reason why this Honorable Court should not adopt the interpretations of Section 8(c) of the Act set forth a Memorandum 190-A is that to do so would bring the Act into conflict with, or require that it be considered an amendment of other federal laws governing employment relations or constituting exercise of constitutional war powers, such as the National Labor Relations Act and the War Labor Disputes Act, respectively. It requires no citation of authorities to demonstrate that the rules of statutory construction uniformly require that an interpretation of a statute which would have such a result should not be adopted, if there is available another reasonable interpretation free of such consequences. The possibilities and probabilities that the interpretations contained in Memorandum 190-A would lead to conflict between Section 8(c) of the Act and other federal laws are so ably demonstrated and documented in the Yale Law Journal article cited above that it would be a work of supererogation to treat of that subject here. The Court's attention is invited particularly to pages 425-430 of said article and to the footnotes appearing on those pages.

To the foregoing reasons why this Honorable Court should not adopt the interpretations of Section 8(c) of the Act contained in Memorandum 190-A, could be added many more. Among these would be that these interpretations are not concurred in by other governmental executive and administrative agencies of equal status with Selective

Service Headquarters in the field here involved; that considerations of public policy preclude the disruption, during this critical period of conversion from a war to a peace economy, of established industrial practices, which would result from adoption of these interpretations; and that veterans should not be deprived, as they would be under these interpretations, of the many advantages which adherence to Congress' intent, expressed in Section 8(e), to grant to veterans the protection of seniority as established in collective bargaining contracts, would afford to the veterans. The foregoing considerations have, however, been fully and ably treated in the Yale Law Journal article; they will, hence, not be repeated here. In any event, these considerations are so cogent as themselves to require rejection of Memorandum 190-A as a guide to the proper interpretation and application of the Act.

Conclusion

For all of the foregoing reasons it is respectfully submitted that the judgment below should be affirmed.

M. H. GOLDSTEIN,

Attorney for Respondent, Roy Granata, as Acting President and Acting Treasurer of Local 13, Industrial Union of Marine and Shipbuilding Workers of America, C. I. O.

APPENDIX A

Section 8(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. * * *

(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety[6] days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year— * *

(A) If such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status and pay;

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on fur-

[6] At time plaintiff applied for reemployment this read forty days.

lough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

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(e) In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: *Provided*, That no fees or court costs shall be taxed against the person so applying for such benefits.

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(g) The Director of Selective Service herein provided for shall establish a Personnel Division with adequate facilities to render aid in he replacement in their former positions of, or in securing positions for, members of the reserve components of the land and naval forces of the United States who have satisfactorily completed any period of active duty, and persons who have satisfactorily completed any period of their training and service under this Act.